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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 325

JOSEF ROSENBERG, SAMUEL FREIER AND HANS EISLER, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 326

ERNEST WEISS, IRENE WEISZ, FERENC WEISZ AND GEZA FRIEDMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and concurring opinions in the circuit court of appeals (R. 1630–1641) have not yet been reported. The opinion of the district court overruling demurrers to the indictment (R. 1587–1594) is reported at 47 F. Supp. 406.

JURISDICTION

The judgment of the circuit court of appeals was entered July 17, 1945 (R. 1641). The petitions for writs of certiorari were filed August 15, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the Act of July 2, 1940, granting the President power to prohibit or curtail exports of military equipment or component parts thereof, represented an unconstitutional delegation of legislative power to the executive.

2. Whether the regulations issued by the President prohibiting the export of specified materials without a license were invalid for the reason that they failed to specify the conditions upon which a license would be granted.

3. Whether the Act of 1940 expired in 1942 despite the fact that the Act of June 30, 1942, purported to extend it.

4. Whether the evidence is sufficient to support the verdict against certain of the petitioners.

5. Whether there was a fatal variance between the indictment and the proof as to the number of conspiracies covered by the indictment.

STATUTES AND REGULATIONS INVOLVED

Section 6 of the Act of July 2, 1940, 54 Stat. 712 (50 U. S. C. App. 701), in pertinent part provides:

> Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment. The authority granted in this section shall terminate June 30, 1942, unless the Congress shall otherwise provide.

The Act of June 30, 1942, c. 461, 56 Stat. 463, provided in pertinent part as follows:

> That section 6 of the Act of July 2, 1940 (54 Stat. 714) is hereby amended to read as follows:
>
> * * * * *

> (d) The authority granted by this section shall terminate on June 30, 1944 or upon any prior date which the Congress by concurrent resolution, or the President, may designate; except that as to offenses committed, or rights or liabilities incurred prior to such date, the provisions of this section and such rules, regulations, and proclamations shall be treated as remaining in effect for the purpose of sustaining any suit, action, or prosecution with respect to such right, liability, or offense.

Proclamation No. 2413 (5 Fed. Reg. 2467), promulgated by the President on July 2, 1940, pursuant to the Act of July 2, 1940, provides in part:

> Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority vested in me by the said act of Congress, do hereby proclaim that the administration of the provisions of section 6 of that act is vested in the Administrator of Export Control, who shall administer such provisions under such rules and regulations as I shall from time to time prescribe in the interest of national defense.
>
> And I do hereby further proclaim that upon the recommendation of the aforesaid Administrator of Export Control, I have determined that it is necessary in the interest of the national defense that on and after July 5, 1940, the articles and materials hereinafter listed shall not be exported from

the United States except when authorized in each case by a license as hereinafter provided:

* * * * *

2. The following basic materials and products containing the same:

* * * * *

q. Platinum group metals.

* * * * *

And I do hereby empower the Secretary of State to issue licenses authorizing the exportation of any of the said articles and materials the exportation of which is not already subjected to the requirement that a license be obtained from the Secretary of State authorizing their exportation and I do hereby authorize and enjoin him to issue or refuse to issue licenses authorizing the exportation of any of the articles or materials listed above in accordance with the aforesaid rules and regulations or such specific directives as may be, from time to time, communicated to him by the Administrator of Export Control.

* * * * *

The Regulations prescribed by the President on July 2, 1940 (5 Fed. Reg. 2469), governing the exportation of articles and materials designated in the proclamation, prescribe a detailed form of application for license (sec. 2) and provide):

* * * I hereby prescribe the following regulations to govern the exportation of:

* * * * *

q. Platinum Group Metals.

* * * * *

2. None of the articles or materials listed above shall be exported unless a license authorizing such export has been issued by the Secretary of State. * * *

* * * * *

3. The Secretary of State will issue export licenses to authorize proposed shipments of the said articles and materials * * * when I have determined that the proposed exportation would not be detrimental to the the interests of the national defense.

* * * * *

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

An indictment was returned against petitioners and two others, Koppel and Silva, in the United States District Court for the Eastern District of New York charging that they and others named as co-conspirators but not indicted conspired to export platinum without a license in violation of the

Act of July 2, 1940, through the medium of crew members employed on ships and airplanes plying between New York and Portugal (R. 11–20). Koppel pleaded guilty and the trial was severed as to Silva (R. 22). Petitioners were all convicted (R. 1564–1565). Rosenberg, Freier and Friedman were each sentenced to imprisonment for one year and eleven months and to pay a fine of $5,000; Eisler, to imprisonment for 1 year and 4 months and to pay a fine of $1,000; Ferenc and Irene Weisz and Ernest Weiss to imprisonment for 13 months and to pay a fine of $500 (R. 8). On appeal, the judgments were affirmed (R. 1641).

The evidence for the Government may be summarized as follows:

About February 1, 1941, petitioners Rosenberg and Freier met Hersch Neumann, Abe Neumann and Arnold Weisz (the latter three named as co-conspirators but not indicted) in an office at 50 Pine Street in New York City and discussed the possibility of profit by exporting platinum (R. 34, 469). Hersch Neumann sent a cable to Salzberg & Alt, a Lisbon firm with which he had formerly dealt, inquiring about the market for platinum (R. 35, 470). The reply received was satisfactory, and thereafter the Neumann brothers and Rosenberg rented an office at 50 Pine Street (R. 35, 39, 470, 472). Hersch Neumann and Rosenberg made inquiries in New York as to the price of platinum and were informed that

a license was necessary for export purposes. When this was reported to the group, Arnold Weisz stated "You cannot do platinum business with a license." (R. 37–39.) In the course of a discussion of the method of sending the metal to Portugal, Rosenberg stated that Eisler, who had an office in the same building, was acquainted with a captain of a Portuguese steamship, the *Concalho Velho* (R. 40–41, 473). At a later date Rosenberg reported to the Neumanns that he had talked with Eisler and that Eisler thought he could arrange for the transportation of the platinum (R. 42). The Neumanns, Weisz, Koppel, Rosenberg and Freier (referred to hereafter as the group) all decided to participate in the platinum venture (R. 43). Koppel purchased 110 ounces of platinum at $34.75 per ounce and brought it to the Neumann-Rosenberg office (R. 44–45, 784–786). Rosenberg put the package in his pocket and, accompanied by Hersch Neumann, went down to Eisler's office. Neumann waited in the outer room while Rosenberg went inside. When he came out, after talking to Eisler, he no longer had the package of platinum in his pocket. He reported that he had delivered the platinum to Eisler. (R. 45–48, 148–150, 474, 787–788). The next day Rosenberg told the group that he was present when Eisler gave the platinum to the Portuguese officer, and that he had placed $250 in an envelope which was to

be held by one Sunley and given to Eisler when word was received that the platinum had been delivered in Lisbon (R. 48, 476–477, 788). In the presence of the Neumanns, Rosenberg called Sunley to ascertain whether the envelope had been received (R. 49, 476). About April 3, 1941, the Neumanns were informed by cable that the platinum had been received by Salzberg & Alt and the group directed that firm to sell it at about $60 per ounce (R. 49, 477). The proceeds of the sale were received by the Neumanns and divided among the group according to their respective interests (R. 52–54, 478, 487–488).

About April 7, 1941, the group and Irene Weisz, Arnold's sister, had a meeting in the office at 50 Pine Street. Arnold reported that petitioner Friedman had told him there was a 10 percent profit to be made by selling platinum in Canada, and the group decided to try to sell the metal there. (R. 55, 56, 489, 790.) Irene offered to go to Canada but Arnold thought that his brother Ernest, who was an American citizen, would encounter less difficulty (R. 56, 791). Platinum was purchased by Arnold with money contributed by the other members of the group. (R. 57–58.) Irene Weisz and Abe Neumann took a part of this platinum to the home of Ernest Weiss in Brooklyn (R. 61–62, 489, 792), and there another brother, Ferenc Weisz, packed it in a "double bottom" suitcase (R. 490–491). Ernest

took the platinum to Canada but did not sell it there (R. 69, 70, 490–491, 793–794). The platinum was redelivered to the Neumann office by Ferenc (R. 69–70).

About April 15 or 16 Koppel told the group that he had seen a Portuguese ship, the *Pero d'Alenquer,* in the harbor, and that he thought a member of the crew might be persuaded to carry platinum (R. 70, 495, 794). Koppel and Rosenberg went to the ship and met one Silva who agreed to take the platinum to Portugal (R. 795, 797–798). Arrangements were made to bring Silva to the office occupied by Arnold Weisz, which had no name on the door (R. 72–73, 496–497, 798). Irene Weisz was present at the meeting at which Rosenberg reported his arrangement with Silva (R. 72–73, 497). Arnold gave her the keys to his office and she went there with Rosenberg and Abe Neumann, taking part of the platinum with her for delivery to Silva (R. 74, 497). Irene left before Koppel and Silva arrived (R. 497). The platinum was given to Silva with directions as to delivery (R. 498, 798).

Subsequent to the arrangements with Silva, there was a discussion about making similar arrangements with a member of the crew of another Portuguese ship, the *Guine* (R. 79, 505, 801). Irene Weisz, who was present at this meeting, obtained a pass to visit the ship in the name of her brother Ernest (R. 79–80, 505–506, 809).

Koppel took the pass and he and Rosenberg went to the *Guine* (R. 80, 506). They arranged with an officer, Casanovas, to take platinum to Portugal for them (R. 80–81, 506–507, 802–803).

The platinum thus sent was received in Portugal by Salzberg & Alt but was sold in Switzerland because a higher price was obtained there (R. 82–91, 499, 500–501). Freier insured Koppel, Rosenberg and Arnold Weisz against loss of their share in the event the United States entered the war before the platinum was received and sold (R. 95–96, 714).

On May 5, 1941, Hersch Neumann received a telephone call for Rosenberg from a man who gave his name as Eisler. Rosenberg was told about the call when he came in and he then left the office (R. 107–108). Subsequently he reported that Eisler had told him that the *Concalho Velho* was due in New York, and that Eisler wanted $1,000 to arrange for transportation of platinum on that ship (R. 108, 92, 509, 806–807). The others thought this price too high, and subsequently Rosenberg reported that Eisler had agreed to take $600 (R. 92–93, 509–510, 807). Platinum was purchased and given to Rosenberg for delivery to Eisler (R. 93–95, 109, 510, 807). Later the Neumanns were notified by cable that the platinum had been received by Salzberg & Alt (R. 109, 511, 808). This shipment was also sold in Switzerland (R. 112–113, 511). At the

time the money for this shipment was received by the Neumanns, Arnold Weisz had been arrested and the money for Arnold's share was paid to Ferenc (R. 115, 123, 133–134). Freier insured Arnold Weisz against loss of this shipment and the agreement for such insurance was typed by Ferenc (R. 115, 718–719).

About May 14, the group learned that the *Guine* was due to arrive in New York (R. 116, 522). Koppel met Casanovas to arrange for another shipment of platinum, but Casanovas stated that he did not intend to return with his ship (R. 118). Casanovas suggested the name of another officer who agreed to take the platinum. This shipment was received by Salzberg & Alt in Portugal (R. 118–119, 524, 530). Arnold Weisz originally had no part in this last shipment, but he bought out Freier's share before delivery was made (R. 117, 120, 523, 547). Irene Weisz brought to the Neumann office the money by which Arnold purchased Freier's share (R. 121–122, 547). The money on this shipment was never paid to the Neumanns because of government restrictions (R. 141, 524, 530).

In the meantime, in the early part of 1941, Arnold Weisz met one Mezenen who was a flight steward on the clipper flying between the United States and Portugal (R. 967–968). Arnold discussed with Hersch Neumann the possibility of making shipments by air but did not enter into a

transaction with him (R. 169). In the early part of May 1941, Weisz called upon Mezenen at his home and requested him to take some platinum to Portugal. Mezenen was not flying but he arranged to have a co-steward, Mario, take the package. Two shipments were thus carried by Mario for Weisz (R. 970–973). On May 8, 1941, a payment of $8,943 for the account of a Lisbon firm was made to the bank account of Ernest Weiss (Gov. Ex. 37, R. 465). On the stand Ernest stated that the money was Arnold's (R. 1440–1443). On June 4, 1941, Arnold Weisz called Mezenen and asked him to wait in front of his building because Weisz did not want the doorman to see him. Mezenen waited outside as instructed, and the cab passed beyond the building. Weisz stepped out, signaled to Mezenen, returned and took a package from the cab (R. 976–977, 1029–1030, 1058–1059). Weisz and Mezenen went to Mezenen's apartment, the other person remaining in the cab (R. 978, 1030, 1059). Weisz delivered platinum and directions to Mezenen which were found on Mezenen's person upon his arrest the next day (R. 978–983). At the trial, petitioner Friedman admitted on the stand that he was the other person in the cab but stated that he had not known that Weisz was carrying platinum until Weisz told him so on the return journey (R. 1283–1286). Originally, when questioned by F. B. I. agents on June 6,

1941, Friedman denied that he had seen Weisz on the evening of June 4 (R. 1041, 1062–1063). Later, on June 13, after having been identified by the taxi driver as the occupant of the cab with Weisz (R. 1041–1043, 1046), Friedman stated that he had made the trip merely to accompany Weisz, and that on the way there Weisz had told him the package contained platinum (R. 1060, 1062). Friedman admitted that he had written or printed cable messages to be sent to Lisbon by Weisz (R. 1293–1294) and also a cablegram inquiring about sources of platinum in South America (R. 1314–1315). The instructions found with the platinum delivered to Mezenen on June 4 were in Friedman's handwriting (R. 1111, 1113). In April 1941, Friedman's bank accounts showed deposits of over $7,000 (R. 1343).

ARGUMENT

1. Petitioners contend (Pet. I 3, 4, 9–15; Pet. II 8, 9, 13, 15–16)[1] that Section 6 of the Act of July 2, 1940, represented an unconstitutional delegation of legislative power to the President. However, the Act limits the power of the President to the prohibition or curtailment of exports of military equipment, component parts thereof, or supplies necessary for the manufacture or

[1] The petition filed on behalf of Rosenberg, Freier and Eisler is designated as Pet. I; the petition filed on behalf of Friedman and the Weiszes is designated as Pet. II.

maintenance of such equipment, and then only on a finding that national defense so requires. Congress has thus determined the policy and fixed the standards for executive action, leaving only the details of execution to the President. The fact that there is a "zone for the exercise of discretion" by the President does not, as petitioners apparently contend, render the delegation of power invalid, even if judged by the standards applicable to internal legislation. *Bowles* v. *Willingham,* 321 U. S. 503, 513–516; see also *Yakus* v. *United States,* 321 U. S. 414, 423–427; *Hirabayashi* v. *United States,* 320 U. S. 81, 102. *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126; *O'Neal* v. *United States,* 140 F. (2d) 908, 912 (C. C. A. 6), certiorari denied, 322 U. S. 729.

Moreover, as both courts below held (R. 1632–1633, 1641, 1590–1591), the acts here prohibited fall in the field of foreign relations in which a larger degree of discretion may properly be accorded to the President. *United States* v. *Curtiss-Wright Export Corporation,* 299 U. S. 304. The interrelationship between national defense and foreign affairs in July 2, 1940, after the fall of France, is too obvious to need exposition. The Act of July 2, 1940, is directly analogous to the early embargo acts referred to by this Court in the *Curtiss-Wright* decision, *supra,* at pp. 322–326. Significantly, the first of these, the Act of June 4, 1794, 1 Stat. 372, like the present Act, authorized

an embargo whenever in the President's opinion "the public safety shall so require."

2. Petitioners Rosenberg, Freier, and Eisler (Pet. I 3, 4–5, 15–22) attack the regulations issued by the President on the ground that, although they specified that a license was required for the export of certain materials and set forth the form of application for such license, they did not specifically state the conditions upon which a license would be granted. This contention is without substance. As we have shown, *supra,* the statute related to a subject peculiarly within the field of executive discretion. There is nothing to suggest that the congressional grant of power to the President to prohibit or curtail exports except upon the conditions specified in rules and regulations required the President to set up in the rules rigid formulae to cover the many changing factors which would enter into the determination of whether a particular shipment could safely be sent out of the country. A rule prescribing a form of application and reserving power to withhold a license if the statutory standard is not met (*supra,* pp. 5–6) is as much a valid exercise of the rule-making power as a statute conferring such discretion is a valid exercise of the law-making power. Cf. *Lieberman* v. *Van de Carr,* 199 U. S. 552, 560–563, and cases cited, holding that statutes conferring discretion to grant or refuse a license do not violate the due process clause.

3. The contention that the Act of 1940 expired on June 30, 1942 (Pet. I 3, 5, 22–25; Pet. II 8, 9, 13, 16–17), is fully answered in the opinions of the circuit court of appeals (R. 1633–1634) and of the district court (R. 1593–1594). The 1940 Act provided that the authority thereby granted "shall terminate July 30, 1942, unless Congress shall otherwise provide." Congress did "otherwise provide" when by the Act of June 30, 1942, c. 461, 56 Stat. 463, it amended Section 6 to extend the authority thus granted to June 30, 1944. The fact that the later act broadened the power of the President in order to meet war conditions certainly did not indicate that Congress intended to terminate the more limited authority theretofore granted to prepare for war.

4. Petitioners Eisler (Pet. I 4, 5, 29–33), Friedman (Pet. II 8, 9, 18–24) and the three Weiszés (Pet. II 8, 9, 24–32) all challenge the sufficiency of the evidence to support their convictions. The proof as to each is separately summarized in the opinion of the circuit court of appeals (R. 1638–1640). We think that it is clear that these petitioners, although they may not have been the heart of the conspiracy, all gave it their informed and interested cooperation. Contrary to petitioner Eisler's contention (Pet. I 33, the evidence against him does not rest solely on testimony in respect of Rosenberg's reports to the group of his conversations with Eisler. There was evidence

that Rosenberg was seen entering Eisler's office with platinum, was seen talking to Eisler, and that when he left Eisler's office he no longer had the platinum on his person; that subsequently that same platinum was received in Lisbon. This evidence, though circumstantial, clearly constitutes independent proof sufficient to connect Eisler with the conspiracy. As to Friedman, his admitted accompaniment of Arnold Weisz on the visit to Mezenen, his conflicting statements in respect thereof, his assistance to Weisz in the preparation of cables, and his suspiciously large bank deposits (see Statement, *supra,* pp. 13–14), all justify the conclusion that he was an active participant in at least part of Weisz's ventures in platinum. The proof also shows that the three Weiszes were aware of their brother's activities, and that they assisted him and the others by performing various valuable, even if subsidiary, services. In view of the concurrence of two courts below as to the sufficiency of the evidence against all of the petitioners, there is no need for further review by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–590.

5. Petitioners assert (Pet. I 4, 5, 25–29; Pet. II 8, 9, 13–15, 32–34) that there was a fatal variance between the indictment, which charged one conspiracy, and the proof, which, they contend, established three conspiracies. As the court

below pointed out (R. 1636–1637), the Canadian transaction, which petitioners claim was a separate conspiracy, was closely tied to the shipments by boat to Portugal. The parties were for the most part the same, and the difficulties encountered in Canada led the group to seek out the Portuguese crew members who took some of the later shipments to Lisbon for them. The clipper shipments were, it is true, less closely integrated with the exports by ship. However, the facts that Arnold Weisz was the central figure in all transactions, that he had discussed the possibility of shipments by air with Neumann, a member of the group (R. 169), that the shipments all involved the export of platinum from New York to Lisbon, justified the jury in concluding that the transactions were all parts of an interrelated scheme, even though all the conspirators were not aware of the full extent of the conspiracy and did not participate in it to the same degree. Cf. *United States* v. *Cohen,* 145 F. (2d) 82 (C. C. A. 2), certiorari denied, 323 U. S. 799; *United States* v. *New York Great A. & P. Tea Co.,* 137 F. (2d) 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783; *United States* v. *Valenti,* 134 F. (2d) 362 (C. C. A. 2), certiorari denied, 319 U. S. 761; *Martin* v. *United States,* 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649.

In any event, even assuming that two separate conspiracies were proved, the variance was not fatal. The indictment, which mentioned shipments by air (R. 13) and listed the June 4 taxi trip of Friedman and Arnold Weisz as an overt act (R. 20), clearly put the petitioners involved in the clipper transactions on notice that this part of their activities was to be the subject of trial. The evidence as to these later transactions was for the most part presented separately from that relating to the shipments by boat. Petitioners' only claim of prejudice is that the evidence as to the platinum delivered to Mezenen and as to Friedman's bank account may have been the basis for conviction of the others (Pet. I 28–29; Pet. II 32–34). In view of the manner in which the evidence was presented, the jury could not possibly have been confused. Moreover, although the trial judge did not, during the trial, limit the evidence of the clipper transactions to the persons directly connected therewith, he did in his charge separately summarize the factors to be considered in determing the guilt of each defendant (R. 1550–1560), and he mentioned the testimony as to the Weisz-Friedman-Mezenen transactions only in connection with his statement of the evidence as to Friedman (R. 1556-1580). Under the circumstances, assuming that there was a variance, it could not have affected the substantial rights of petitioners and, hence, does not consti-

tute grounds for reversal. *Berger* v. *United States*, 295 U. S. 78, 82.

CONCLUSION

The decision below is correct. It presents no conflict of decisions or questions of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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